No. 15021

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

PAGE

Argument 1

I.

This court may correct plain error 1

II.

United States v. Sugden (C. A. 9, Nov. 10, 1955), applies to this case 2

III.

There is no evidence supporting the finding that appellant, Rayson, was guilty 3

TABLE OF AUTHORITIES CITED

Cases	Page
Din v. United States, 232 F. 2d 283	2
Flanders v. United States, 222 F. 2d 163	2
Mosca v. United States, 174 F. 2d 448	2
United States v. Bookie, 229 F. 2d 130	2
United States v. Pierce, 124 Fed. Supp. 264, aff'd 224 F. 2d 281	2
United States v. Sugden, 76 S. Ct. 709	2, 3
United States v. White, 228 F. 2d 832	3

Rule	
Federal Rules of Criminal Procedure, Rule 52(b)	2

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ARGUMENT.

I.

This Court May Correct Plain Error.

The appellee's brief does not try to meet the points raised by appellant for a reversal of his conviction. The appellee urges that the conviction of Rayson on counts II and III of the indictment be affirmed on technical procedural grounds.

We are not here concerned with technicalities. The point made by appellant is that the finding that appellant was guilty under counts II and III of the indictment is clearly erroneous, as there is no competent evidence or, in fact, any evidence at all to show that appellant Rayson ever received, concealed, transported or facilitated the

concealment or transportation of a narcotic drug, or ever sold or facilitated the sale of a Narcotic drug to Norman Fletcher.

Furthermore, this Court may reverse appellant's conviction under its power to correct "plain error."

Fed. Rules Crim. Proc., Rule 52(b);

Din v. United States (C. A. 9, Mar. 2, 1956), 232 F. 2d 283.

Also, in *Mosca v. United States* (9th Cir., 1949), 174 F. 2d 448, cited by appellee (Br. p. 6), this Court merely said that the motion for acquittal "need not be considered. However, we have considered it and find no merit in it." (P. 451.)

II.

United States v. Sugden (C. A. 9, Nov. 10, 1955) Applies to This Case.

As has been pointed out in appellant's opening brief (p. 12) in the opinion in *United States v. Sugden, supra,* this Court stated the rule applicable to the case at bar.

In that case the agent of the Federal Communications System merely listened to the radio messages broadcast by the defendants. In the case at bar the officers listened to and recorded the telephone conversations at the receiver of the telephone.

Appellee relies on *United States v. Pierce* (N. D. Ohio), 124 Fed. Supp. 264, affirmed 224 F. 2d 281 (C. A. 6, June 15, 1955).

United States v. Bookie (C. A. 7, Jan. 12, 1956), 229 F. 2d 130;

Flanders v. United States (C. A. 6, Apr. 26, 1955), 222 F. 2d 163; and

United States v. White (C. A. 7, Jan. 6, 1956), 228 F. 2d 832. (Br. pp. 12-13.)

The Supreme Court of the United States, on April 30, 1956, affirmed the judgment in *United States v. Sugden* (76 S. Ct. 709). This is the equivalent of adopting the decision and reasoning of this Court in that case. Consequently, the cases, *supra,* relied upon by appellee, having been decided prior to April 30, 1956, are no longer authority and are of no consequence.

III.

There Is No Evidence Supporting the Finding That Appellant, Rayson, Was Guilty.

As has been pointed out in appellant's opening brief, Fletcher, immediately after he was supposed to have paid $700.00 to appellant Rayson, left the officers and was absent for two hours, which would have given him ample time to dispose of the money he said he had paid Rayson and to pick up some heroin and plant it under the railroad sign at Budlong and Slauson Avenues in Los Angeles (Br. pp. 13-14).

There is absolutely no evidence in this case that appellant Rayson had anything to do with the delivery of any heroin to the railroad sign, or that he ever had any heroin in his possession.

As appears in appellant's opening brief (p. 1), appellant Rayson and one Ollie W. Kelley were indicted. Count I of the indictment charging defendants Rayson and Kelley with conspiring to possess, sell and conceal narcotics. The Court found Kelley not guilty on all three counts, found appellant Rayson not guilty on the conspiracy count, but guilty on counts II and III which

charged the defendants with unlawful receipt, transportation and concealment of heroin, and with unlawfully selling and facilitating the sale of heroin to one Norman Fletcher (Br. pp. 1-2).

The alleged conversations between appellant Rayson and Fletcher over the telephone as to where the heroin was going to be put, and the other alleged conversations with Fletcher over the telephone, and even the alleged payment of the money for the heroin, are not sufficient to support a conviction of appellant Rayson on either count II or count III, which charged unlawful receipt, transportation, concealment, sale and facilitating the sale of heroin. There is no evidence whatsoever that appellant Rayson delivered any heroin to any person in any manner. The implied finding that appellant Rayson put the heroin under the railroad sign is based upon pure conjecture, and there is no support in the evidence for such implied finding.

If the defendants had been found guilty of a conspiracy under count I of the indictment it might have been argued that the evidence as to the alleged telephone conversations and other activities of the defendants would have sustained the conviction of a conspiracy, because in such case they could have been construed as overt acts in the conspiracy. However, such evidence does not show a violation of either of the statutes alleged in counts II and III of the indictment.

Appellant Rayson respectfully contends that his conviction should be reversed.

Respectfully submitted,

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